IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 137 OF 1989

Nasirkhan Fazalkhan. .... Appellant.

Versus.

Kalyan Municipal Council, Kalyan. .... Respondent.

Shri A.N.Mulla for the Appellant.

Shri A.S.Rao for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 6th April, 2005.

ORAL JUDGMENT.

1. On 4th April 1989 the Second Appeal was admitted by observing that it is admitted on Ground No.15. Ground No.15 reads thus:

> 15. The learned Additional District Judge has erroneously held that the Appellant has built a construction on a public road in absence of any iota of evidence on record.

2. Though substantial question of law is not specifically framed while admitting the Second Appeal it is obvious that this Court felt that Ground No.15 in the

Memorandum of Appeal raises a substantial question of law.

3. With a view of appreciate the submissions made by the learned Counsel appearing for the parties, it is necessary to refer to the facts of the case. The Appellant-Plaintiff filed a suit for declaration that the construction of House No.17-B in Municipal Ali No.20 is legal. A prayer for perpetual injunction was made restraining the Respondents from demolishing the suit house without following due process of law. The said suit was originally filed against the erstwhile Kalyan Municipal Council. The case made out by the Appellant/Plaintiff is that an application was made on 12th April 1981 by the Appellant/Plaintiff to the Municipal Council seeking permission to construct a structure admeasuring 8' x 20'. As according to the Appellant/Plaintiff no reply was received to the said Application, he carried out construction on the basis of the deemed permission. It is his contention that the suit structure is assessed to the payment of property tax. The suit is filed on the ground that the Officers of the Municipal Council threatened to demolish the suit structure.

4. The suit was contested by the erstwhile Municipal

Council by filing Written Statement. It was contended that the suit structure is constructed by making encroachment on the public road. It was contended that the suit was not maintainable as statutory notice is not served on the Municipal Council. It was contended that the construction is illegal. The Respondent/Defendant denied that any application for permission was made on 12th April 1981.

5. Surprisingly both the parties did not lead any oral evidence. The trial Court accepted the case made out by the Plaintiff that on 12th April 1981 application seeking permission was submitted by the Appellant/Plaintiff. The learned trial Judge held that the inward register of the relevant period ought to have been produced by the Municipal Council to substantiate the case that the Application was not received. The trial Court, therefore, decreed the sit. In Appeal preferred by the Municipal Council, the decree has been set aside. The Appellate Court held that the Application dated 12th April 1981 was not proved and in any event the said application was not in terms of the requirement of section 189(2) of the Maharashtra Municipalities Act, 1965. The Appellate Court held that the suit does not fall under section 38 of the Specific Relief Act 1963 and therefore, statutory notice under

section 304 of the said Act of 1965 was required to be issued. The Appellate Court also referred to the contention that the suit structure was constructed on the road.

6. I have heard the submissions of the Counsel appearing for the parties.

7. In the suit filed by the Appellant/Plaintiff apart from the prayer for declaration, there was a prayer for perpetual injunction restraining the Municipal Council from demolishing the suit structure without following due process of law. At least to the extent of the said prayer the suit was maintainable without a statutory notice in view of sub-section (4) of section 304 of the said Act 1965.

8. The Appellate Court has framed points for determination on the basis of the Application dated 12th April 1981 allegedly made by the Appellant. The Appellate Court has ignored that one of the contentions raised by the Appellant/ Plaintiff was that the structure could not have been demolished without following due process of law. Unfortunately both the parties did not lead oral evidence. It is possible to contend that when the Appellant went to the Court of

law, it was for whim to establish that the suit structure was not constructed on the public road. However, there is no issue framed on this aspect by the trial Court and no point for determination was framed by the Appellate Court on this factual aspect. The cause of action as pleaded in the suit was that there was oral threat given by the officers of the Municipal Council to demolish the suit structure. It is pertinent to note that in the written statement there is a vague denial of the averments made in the paragraph No.1 of the plaint in which it is alleged that oral threat of demolition was given.

9. As the issue based on the allegation of the Council that the suit structure was constructed on the road was not framed, there was no occasion to deny perpetual injunction in favour of the Appellant/Plaintiff. If according to the Defendant-Council the suit structure was illegal, action of demolition could not have been taken without following due process of law. In view of the settled legal position, it is not necessary to consider the controversy regarding submission of application for permission, the legality of the suit structure etc. It is for the Respondent-Corporation to adopt due process of law and as and when law due process of law is taken, it is for the Plaintiff/Appellant to

challenge the same.

10. In view of the discussion it is necessary to set aside the impugned Judgment and Decree of the Appellate Court as well as the Judgment and Decree passed by the trial Court. It is true that the trial Court could not have declared that the construction of the suit structure is legal. However, the decree for perpetual injunction granted by the trial Court was correct and the same will have to be continued.

10. Hence the following order is passed:

(i) The impugned Judgments and Decrees of the Courts below are quashed and set aside and Regular Civil Suit No.537 of 1982 stand decreed in the following terms:

. "The Defendant-Council/Corporation is hereby permanently restrained from demolishing the suit structure of the Plaintiff without following due process of law."

(ii) It is made clear that all contentions

of the parties as regards the legality of the suit structure are kept expressly open.

(iii) The Second Appeal is partly allowed in the above terms.

(iv) No order as to costs.

(v) The parties to act on an authenticated copy of this order.

Judge.